MOTION FILED
NOV 2 5 2002

No. 02-626 (5)

In The
Supreme Court of the United States

SOUTH FLORIDA WATER MANAGEMENT DISTRICT,

Petitioner,

v.

MICCOSUKEE TRIBE OF INDIANS, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF *AMICI CURIAE* OF THE NATIONAL WATER RESOURCES ASSOCIATION, WESTERN COALITION OF ARID STATES, WESTERN URBAN WATER COALITION, AND THE METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE*

Pursuant to Rule 37 of this Court, the National Water Resources Association (NWRA), the Western Coalition of Arid States (WESTCAS), the Western Urban Water Coalition (WUWC) and the Metropolitan Water District of Southern California (MWD) request leave to file the accompanying brief as *amici curiae* in support of Petitioner South Florida Water Management District's petition for a writ of certiorari. Consent for *amici* participation was requested of all parties on November 7, 2002, but was denied by respondents Miccosukee Tribe of Indians and Friends of the Everglades, Inc.

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QUESTION PRESENTED

Whether the transfer of untreated water from one natural source to another constitutes an "addition" of pollutants under the federal Clean Water Act, 33 U.S.C. Section 1251, *et seq.*

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INTEREST OF *AMICI CURIAE*

Amici curiae, the National Water Resources Association, the Western Coalition of Arid States, the Western Urban Water Coalition and the Metropolitan Water District of Southern California submit this brief in support of Petitioner South Florida Water Management District's Petition for a Writ of Certiorari seeking reversal of the lower court's decision in *Miccosukee Tribe of Indians v. South Florida Water Management District*, 280 F.3d 1364 (11th Cir. 2002).[1]

NWRA is a voluntary organization of state water associations whose members include cities, towns, water conservation and conservancy districts, irrigation and reservoir companies, ditch companies, farmers, ranchers and others with an interest in both water quantity and water quality issues in the Reclamation states of the Western United States. Its members range from the Metropolitan Water District of Southern California, with a service area population of approximately 17 million, to Dirk Parkinson, a member of the Idaho Water Users Association and the owner of the McCormick Rowe Ditch in St. Anthony, Idaho, which is used to irrigate 240 acres of farmland.[2] As described in greater detail below, NWRA

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[1] Pursuant to Rule 37.6 of this Court, *amici* represent that counsel for *amici* authored this brief in its entirety and that no person or entity other than *amici* and their representatives made any monetary contribution to the preparation or submission of this brief.

[2] Other NWRA members include the Arizona Cattlemen's Association (AZ), the Central Arizona Water Conservancy District (AZ), the Central Arizona Water Conservation District (AZ), Coachella Valley Water District (CA), Glen-Colusa Irrigation District (CA), Imperial Irrigation District (CA), East Bay Municipal Utility District (CA), San

(Continued on following page)

members directly engage in, or are the recipients of water from, innumerable transbasin water diversion projects.[3] If these diversion and storage activities were effectively halted or became prohibitively expensive to operate due to the need to obtain an NPDES permit, NWRA members would be unable to meet essential domestic, agricultural and industrial water demands.

The Mission Statement of WESTCAS provides that it is "the voice of water quality in the Arid West" and an advocate for "laws, regulations and policies that ensure sustainable supplies of water for the Arid West and protect public health and the environment." WESTCAS was formed over ten years ago in order to appropriately address water quality issues in an area of the country where precipitation is oftentimes less than ten inches per year and, as a consequence, unique "arid ecosystems" are the norm. WESTCAS members include numerous water and wastewater agencies, such as the City of Phoenix, Tucson Water, the Salt River Project, Eastern Municipal Water District, Los Angeles County Sanitation District, the

Diego County Water Authority (CA), Colorado River Water Conservation District (CO), City of Fort Collins (CO), Montana Water Users Association (MT), Garrison Diversion Conservation District (ND), Middle Rio Grande Conservancy District (NM), Las Vegas Valley Water District (NV), Talent Irrigation District (OR), Brazos River Authority (TX), Provo River Water Users Association (UT), and Methow Valley Irrigation District (WA).

[3] NWRA has maintained a close working relationship with the U.S. Bureau of Reclamation, as many of its members are the owners, operators or beneficiaries of Reclamation water projects, including projects with significant transbasin components. See, e.g., Colorado's Frying-Pan Arkansas Project, California's Friant-Kern Canal (part of Central Valley Project), and New Mexico's San Juan Chama Project.

Sweetwater Authority, Denver Metro Wastewater District, Clark County Sanitation District, the cities of Albuquerque and Santa Fe, and El Paso Water Utilities. Many WESTCAS members depend upon transbasin water diversions both to meet municipal water supply requirements and to sustain, by virtue of water transport or wastewater discharge, riparian ecosystems that have developed in ephemeral or intermittent stream systems and are now dependent on the continued delivery of "foreign" or imported waters.

The Western Urban Water Coalition is an association of the largest municipal water utilities in the Western United States. The goal of WUWC members is to provide a reliable, high-quality urban water supply for present and future water users. WUWC members currently serve over 30 million urban water consumers in the states of Arizona, California, Colorado, Nevada, Utah and Washington, including those residing within the cities of Phoenix, Denver, San Diego, Los Angeles, San Francisco, Oakland, Las Vegas, Salt Lake City, Tucson and Seattle. WUWC members own and operate water management, water supply and hydroelectric projects. These projects consist of water conduits and reservoirs, including transbasin water diversion facilities. The continued unimpeded operation of these facilities is essential to the continued ability of WUWC members to fulfill their mission of servicing the water resource-related needs of the major population centers of the Western States.

The Metropolitan Water District of Southern California is a public corporation which, through its 26 member public agencies, provides water to 17 million people in Southern California. MWD owns and operates an extensive system of aqueducts, canals and water conveyance

structures that are essential to supply the water consumption needs of Southern California.

In the West, diversion of water in the spring as mountain snows melt, its transport through tunnels, canals, pipelines and natural stream systems to the place of need, and its subsequent storage in reservoirs until the time of use are all essential steps in meeting water supply requirements. According to the Upper Colorado River Commission, in the Upper Colorado River Basin alone there exists at least 36 transbasin diversions which remove approximately 700,000 acre feet ("a/f") of water from the basin of origin in any one year and transport it to the basin of receipt. Included within these diversions are the transbasin projects operated by the Northern Colorado Water Conservancy District, whose Colorado Big Thompson Project transports an average of 228,000 a/f per year to irrigate over 600,000 acres,[4] the waterworks of the City of Colorado Springs, whose transbasin diversions in 2001 totaled approximately 75,000 a/f, representing almost eighty (80) percent of the City's total water supply,[5] and the City of Denver's Roberts and Moffat Tunnels, which convey in excess of 200,000 a/f annually for municipal use, thereby meeting forty-five percent of the Denver municipal

[4] The Northern District, an NWRA member, also operates the Windy Gap transbasin diversion project which is designed to provide approximately 48,000 a/f of water per year on average for municipal/industrial use.

[5] Colorado Springs, another NWRA member, could potentially face difficulties in managing its water supplies even "within" the Arkansas River basin, as certain tributaries from which water is diverted contain natural fluoride levels in excess of anticipated water quality standards for the segments into which discharges of the water would occur.

system demand. Other examples of transbasin diversions include the Provo River Project in Utah, which imports over 100,000 a/f per year for use in the Salt Lake City metropolitan area, the Westlands Water District in California where over two-thirds of the water used to irrigate 570,000 acres comes from transbasin deliveries, the Colorado River Aqueduct operated by the Metropolitan Water District of Southern California which can draw in excess of 1 million acre-feet in a given year,[6] and New Mexico's San Juan Chama Project, which diverts from the San Juan River Basin to the Rio Grande River Basin, supplying water to Santa Fe, Albuquerque, and various Indian tribes.

To the extent these systems convey natural waters from one distinct body of moving water into another where such water would not otherwise have flowed, under the *Miccosukee* opinion a "regulated" discharge of pollutants would be found to exist and each of the owners/operators of such facilities would find it necessary to either significantly modify their operations, build and operate expensive water treatment systems, or curtail their operations altogether. This would be the case even though they did nothing to "add" pollutants to the diverted waters and despite the fact that many of these essential diversion and transport facilities existed well before the passage of the federal Clean Water Act. *See, e.g.,* California's All

[6] California's All American Canal is the largest existing interbasin transfer (over 3.5 million a/f ("ma/f"), while California is also the home of the Friant-Kern Canal (over 1.5 ma/f) and the Francis Carr Tunnel (over 1.8 ma/f), both of which are a part of the Bureau of Reclamation's Central Valley Project.

American Canal diversion from the Colorado River (1942); the Los Angeles Aqueduct (1913); the Dolores Project of Colorado (late 1880's); and the St. Mary's River diversions into the Milk River in Montana (1911).

Finally, it must be noted that a significant number of transbasin water diversions, including many of those noted above, occur on interstate stream systems, the waters of which have been allocated between the states by interstate compact or Supreme Court decree.[7] Treating mere water transfers as regulated activities under the Clean Water Act could hold significant future implications for such "interstate" allocation schemes. For example, existing compact entitlements may not be fully utilized, as transbasin diversions to areas of highest demand would be either unavailable or cost prohibitive.[8] In addition, "downstream" states could raise water quality concerns in an effort to either have waters left in the basin of origin by "upstream" states, thereby reaping a water delivery windfall, or use the point source permitting process as leverage to ensure additional downstream deliveries. Such potential confrontations, with tremendous public policy implications, need to be avoided at all costs.

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[7] *See*, for example, Upper Colorado River Compact, 63 Stat. 31 (1949); Republican River Compact, 57 Stat. 86 (1943); Rio Grande River Compact, 53 Stat. 785 (1939); South Platte River Compact, 44 Stat. 195 (1926); and Colorado River Compact, 42 Stat. 171 (1921). *See also*, *Colorado v. New Mexico*, 459 U.S. 176 (1982); *Nebraska v. Wyoming*, 325 U.S. 589 (1945); *Wyoming v. Colorado*, 259 U.S. 419 (1922).

[8] In Colorado, for example, while the vast majority of the population resides on the Eastern Slope of the Rocky Mountains, most of the available water supply is to be found on the Western Slope.

SUMMARY OF ARGUMENT

The ability to freely divert, transport, store and use water in accordance with state law and water allocations made thereunder is vital to the social and economic well-being of the West. This includes the ability to move water, utilizing pipelines, canals, ditches and natural stream systems from one river basin or sub-basin to another, so as to meet municipal, agricultural and industrial water demands. Both Congress and this Court have historically deferred to the states in matters of water use, *California Oregon Power Company v. Beaver Portland Cement Company*, 295 U.S. 142, 158, 162 (1935), and have assiduously avoided impinging upon state and local authority. The federal Clean Water Act, 33 U.S.C. § 1251, *et seq.*, does not contain any "plain statement" indicating a contrary intent, *Gregory v. Ashcroft*, 501 U.S. 452, 461 (1991) and, in fact, expresses Congress' continued desire to honor state and local decision-making in the management of water resources. 33 U.S.C. § 1251(g).

The Clean Water Act simply fails to support the premise that the mere movement of water in order to meet critical water needs, in the absence of the addition of any pollutants by the water purveyor, constitutes a regulated point source discharge. Any incidental water quality impacts associated with such water diversion activities are most appropriately addressed under state law. *National Wildlife Federation v. Gorsuch*, 693 F.2d 156 (D.C. Cir. 1982). Given the significance of this issue to municipal, agricultural and industrial water suppliers and the existing conflict in the circuits over this question, there can be no doubt but that this Court should issue the requested writ of certiorari.

ARGUMENT

I. The Eleventh Circuit Decision Cannot be Reconciled with Opposing Opinions in the D.C. Circuit, the Fourth Circuit and the Sixth Circuit.

As noted by Petitioner, the Eleventh Circuit decision is inconsistent with prior rulings by the Court of Appeals in the D.C. Circuit, the Fourth Circuit and the Sixth Circuit. *See, NWF v. Gorsuch, supra*; *United States v. Law*, 979 F.2d 977 (4th Cir. 1992); *Appalachian Power Company v. Train*, 545 F.2d 1351 (4th Cir. 1976); *National Wildlife Federation v. Consumer's Power*, 862 F.2d 580 (6th Cir. 1988). *See also, Froebel v. Meyer*, 217 F.3d 928, 938 (7th Cir. 2000) (a regulated point source can be found where *an artificial mechanism* first introduces a pollutant). It is critical for the future of state and local water planning that this dispute over NPDES permit requirements be expeditiously resolved. As it now stands, water suppliers, including major Western municipalities and irrigators who depend on transbasin diversions, lack the necessary certainty relative to both the continued availability of their existing water supplies and the cost of delivering those supplies that can remain in their water portfolios if point source discharge permits were to be required.

EPA has conceded that pollution associated with dams and diversions "may not be amenable to the nationally uniform controls contemplated by § 402 because pollution problems are highly site-specific. . . . " *Gorsuch*, 693 F.2d at 177, fn.62. Having noted that "Congress did not want to interfere any more than necessary with state water management, of which dams are an important component," the *Gorsuch* court correctly observed that "[h]ad it considered the matter, Congress might well have decided

that dam-caused pollution was a problem best addressed through state programs." *Id.* at 178. In other words, "if confronted with the issue, [Congress might] have decided to leave the control of dams insofar as they affect water *quality* to the states. Such a policy would reduce federal/state friction and would permit states to develop integrated water management plans that address both quality and quantity." *Id.* at 179.

According to the D.C. Circuit, local control over the use of water resources represents sound public policy.

> Moreover, dams are a major component of state water management, providing irrigation, drinking water, flood protection, etc. In light of these complexities, which the NPDES program was not designed to handle, it may well be that state areawide water quality plans are the better regulatory tool.

Id. at 182. *California Oregon Power Company v. Beaver Portland Cement Company*, 295 U.S. 142, 158, 162, 165 (1935) ("The public interest in such state control in the arid land states is definite and substantial.") *Amici* agree. "State and local" regulatory tools are the most technically sound and legally appropriate control mechanisms for addressing water quality impacts associated with water diversion activities. Section 208 areawide management plans, Section 319 nonpoint source control programs, and Section 303(e) state continuing planning processes, when combined with unique state statutory and regulatory requirements, represent the Congressionally intended mechanism for the integration of water quality and quantity.

Unfortunately, the Eleventh and Second Circuits[9] have ignored the insightful legal reasoning and public policy determinations of their judicial brethren. This Court must now resolve the controversy.

II. The Eleventh Circuit Opinion is Contrary to the Federal/State Balance Governing the Use of Water.

It is a time-honored legal maxim that rights to the use of water are to be determined according to the law of the states. *California Oregon Power Company*, *supra* at 158, 162.[10] As noted in *California v. United States*, 438 U.S. 645, 653 (1978):

> The history of the relationship between the Federal Government and the States in the Reclamation of the arid lands of the Western States is both long and involved, but through it runs the constant thread of purposeful and continued deference to state water law by Congress.

The above sentiment is reflected in Section 101(g) of the federal Clean Water Act, 33 U.S.C. § 1251(g). This section explicitly provides:

> It is the policy of Congress that the authority of each State to allocate quantities of water within

[9] *See, Catskill Mountains Chapter of Trout Unlimited v. City of New York*, 273 F.2d 481 (2nd Cir. 2001).

[10] In the West, some form of the "prior appropriation" system is the predominant method of water allocation. Corbridge and Rice, Vranesh's Colorado Water Law, § 1.2 (1999).

> its jurisdiction shall not be superceded, abrogated or otherwise impaired by this Act. It is the further policy of Congress that nothing in this Act shall be construed to supercede or abrogate rights to quantities of water which have been established by any State. Federal agencies shall cooperate with State and local agencies to develop comprehensive solutions to prevent, reduce and eliminate pollution in concert with programs for managing water resources.

Id. This deference to state law in matters implicating water use is subsequently reiterated in Section 510 of the Act.

> Except as expressly provided in this Act, nothing in this Act shall . . . be construed as impairing or in any manner affecting any right or jurisdiction of the states with respect to the waters (including boundary waters) of such states.

33 U.S.C. § 1370.

Federal regulation of the simple "movement" of water, as would be mandated under the Eleventh Circuit opinion, would be in direct contravention of this well established balance between state and federal interests. It would impair state water allocations and upset those settled expectations in water management which have led to the water infrastructure investments which now literally sustain the economies of the West.[11]

[11] By way of further explication, if water transfers constituted the addition of pollutants, such water movements would be subject to the total maximum daily load (TMDL) provisions of Section 303(d), 33 U.S.C. § 1313(d) of the Act and the federal antidegradation regulations,

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III. There Exists no Clear Congressional Statement of Intent Endorsing Such Interference with State Laws.

Requiring NPDES permits for mere water collection and delivery activities would intrude upon matters which fall, as discussed above, within the historic power of the states. The management of land and water is predominantly a state prerogative. *See*, *California Oregon Power Co.*, *supra*; *Village of Euclid v. Amber Realty Co.*, 272 U.S. 365 (1926). Under the Eleventh Circuit opinion, this unwarranted intrusion on state sovereignty would occur in the absence of any clear directive from Congress that it intended this type of federal interference with the ability of state and local governments to control and manage their water resources.[12] Without such a "plain statement," the Eleventh Circuit opinion cannot stand. *See*, *Gregory v. Ashcroft*, *supra*; *United States v. Lopez*, 514 U.S. 549, 581 (1995) (Kennedy, J., concurring). As this Court most recently reiterated in *Solid Waste Agency v. Army Corps of Engineers*, 531 U.S. 159, 173 (2001), where a statutory interpretation "alters the federal-state framework by permitting federal encroachment upon a traditional state power," Congress must clearly convey its intent. That clear message as it relates to the transport of water supplies cannot be found in the Clean Water Act.

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40 C.F.R. § 131.12. In many cases, it is conceivable that the only way to curtail so-called improper pollutant loadings would be to reduce the amount of flows.

[12] It cannot be forgotten that the owners and operators of the water systems are not adding pollutants to any waters prior to the water transport – they are simply moving the natural waters from one waterbody to another.

Furthermore, as underscored by the devastating drought of the past summer in the Western United States, along with the accompanying fires, there exists a need to maximize the use of scarce water resources. "Maximum utilization" is enhanced by innovative state programs,[13] such as water banking, the operation of water exchanges, dry year transfer of water from agricultural to urban use, and water reuse projects. Each of these undertakings employs what would otherwise be underutilized or even wasted water and turns it into a valuable asset available to meet agricultural, municipal and industrial water demands. However, in many Western states, such water supply innovations are available only as a direct consequence of the ability to both freely transport water to an area of need and to reuse to extinction waters which are not native to a given basin. Requiring a NPDES permit and accompanying controls on each transbasin diversion would stifle these necessary water management initiatives,[14] as Clean Water Act permit requirements would stand in the way of simply moving the water from one basin or sub-basin to another. Certainly such an impingement upon state and local water supply options could not

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[13] See *Fellhauer v. People*, 167 Colo. 320, 336, 447 P.2d 986, 994 (1968).

[14] It must be noted that, at least in the opinion of the Ninth Circuit, "[t]he Act does not impose liability only where a point source discharge creates a net increase in the level of pollution. Rather, the Act categorically prohibits any discharge of pollutants from a point source without a permit." *Committee to Save Mokelumne River v. East Bay Utilities*, 13 F.3d 305, 309 (9th Cir. 1993). Hence, the actual chemical make up of the water delivered from the basin of origin may be irrelevant, and its transfer may be prohibited or limited simply due to the presence of naturally occurring constituents.

have been within the contemplation of Congress when it enacted the Section 402 point source permit requirements, 33 U.S.C. § 1342.

CONCLUSION

There are very few issues that are more critical to municipalities, conservancy and conservation districts, canal and ditch companies, and individual farmers and ranchers in the West then their continued ability to utilize scarce water resources when and where they are needed. This necessarily involves the collection, storage and conveyance of that water through pipelines, tunnels, canals and natural waterbodies. Such water management activities have always been, and must remain, a state and local prerogative.

The Eleventh Circuit's conclusion that the mere movement of natural waters from one stream or river to another constitutes a regulated "addition" of pollutants is clearly at odds with decisions reached by other circuits. Furthermore, not only is there no plain legislative statement in support of this impingement upon the traditional authority of local entities, in addition there can be no doubt that the decision would significantly interfere with the federal/state balance relative to the use of water. *Amici* therefore urge this Court to (i) grant their Motion for Leave to File this *Amicus* Brief, (ii) grant the Petition for

Certiorari, and (iii) reverse the decision of the Eleventh Circuit.

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